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No. 85-1966

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

8.41 ACRES OF LAND, MORE OR LESS, SITUATE IN ORANGE COUNTY, STATE OF TEXAS, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Petitioners The Firestone Tire & Rubber Company and KWW Associates[1] reply to the opposition of the United States to the petition for a writ of certiorari to review the decision of the Court of Appeals for the Fifth Circuit in this case.

ARGUMENT

1. The Government contends that the petition is untimely because the second decision of the court of appeals, in 1984, resolved all the issues in this case and petitioners were bound to seek review of that decision or forgo

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[1] The listing required by Rule 28.1 is in the petition at p. i, n.1.

the opportunity to have the issues decided by this Court. In support of that claim, the Government cites several decisions of this Court holding or stating that the mere re-entry by a lower court of a previous judgment does not extend the time within which review by this Court may be sought. (Br. in Opp. 6.)

The rule of those cases is not pertinent to this case. This case entailed no mere re-entry of a prior judgment without intervening proceedings that went to the merits. Here the district court, true enough, did initially enter the judgment that the court of appeals directed it to enter by its 1984 decision. (Pet. 87a-92a.) But there was more. The district court entertained and granted a motion for a new trial. (Pet. 93a-100a.) The Government filed a petition for mandamus in the court of appeals to undo that action. The petition was contested. A panel of the court of appeals issued the writ, after concluding that the grant of a new trial was inconsistent with the court's mandate. (Pet. 101a-104a.) The district court complied with the writ by entering the judgment commanded of it. (Pet. 105a-107a.) The landowners took an appeal from that judgment. The appeal was given a new docket number different from the number assigned to either the first or the second previous appeals by the Government. The appeal was entertained by the court of appeals and decided by it, with an opinion, by a judgment affirming the judgment below. (Pet. 1a-8a, 108a-109a.)

The time within which to apply to this Court for review of that decision of the court of appeals did not begin to run until the decision was made. The decision was not the nullity that the Government would make of it. In form and in substance the decision and this petition to review it satisfy the pertinent statutory requirements. It was a decision in a case that was "in [a court] . . . of appeals," 28 U.S.C. § 1254, the decision was properly styled by the court its "judgment" (Pet. 109a), and

the petition for certiorari was filed "within ninety days after the entry of such judgment," 28 U.S.C. § 2101(c).

A petition for certiorari certainly could have been filed asking review of the 1984 court of appeals decision. Indeed, since the errors of law that the court has perpetuated in subsequent decisions were committed in the opinion accompanying its decision on the Government's first appeal, in 1982 (Pet. 47a-59a), a petition could have been filed asking for review of that decision. The fact that no petition was filed to review that first interlocutory decision (or, if it had been the fact, that such a petition was filed and denied) does not preclude consideration of a petition to review the court of appeals' final decision in the matter. And the decision rendered in 1985 was unquestionably a final decision subject to review in this Court.

Had nothing more happened on remand after the 1984 court of appeals decision than the entry of the prescribed judgment by the district court, and had an attempted appeal from that judgment been dismissed, as the court of appeals' own precedents indicate that it would have been,[2] then the timeliness issue proffered by the Government would have been posed. Quite possibly the rule of *FTC* v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211-12 (1952), would require the denial of a petition purportedly seeking review of the court of appeals' dismissal of such an attempted appeal. But more did happen in this case. The district court entertained and granted a motion for new trial and then withdrew the grant and entered a new judgment in obedience to a writ of mandamus. The court of appeals recognized the significance of these further proceedings by entertaining the

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[2] Davis v. United States, 244 F.2d 308 (5th Cir. 1957); Hoxsey Cancer Clinic v. United States, 212 F.2d 439 (5th Cir.), *cert. denied*, 348 U.S. 835 (1954); Amalgamated Ass'n of Street Elec. Ry. & Motor Coach Employees v. Southern Bus Lines, 201 F.2d 53 (5th Cir.), *cert. denied*, 345 U.S. 964 (1953).

landowners' appeal and deciding it, with a reasoned opinion, by affirming the district court's judgment. The court did not dismiss the appeal, as the Government urged it to do on the basis of the precedents cited in the margin above (Br. for United States, 5th Cir. No. 85-2536, p. 6).

It is not significant to the issue of timeliness that the court of appeals relied in major part on the doctrine of the "law of the case" in the opinion accompanying its judgment of affirmance. The law of the case can be established, and usually is, by a clearly interlocutory decision. Reliance on the doctrine by the court of appeals does not mean that its 1985 affirmance of the district court's final judgment was a mere restatement of its 1984 reversal of a previous district court judgment.[3]

In the cases cited by the Government to support its claim of untimeliness, unlike this case, no alteration of the substantive rights adjudicated in the prior orders was sought by the parties nor was any request for such an alteration entertained by the tribunal in question. In *Minneapolis-Honeywell*, the Court stated that a post-judgment memorandum filed by petitioners in a court of appeals did not extend the period for seeking review in this Court because "in no manner" did the memorandum seek amendment of the substantive rights adjudicated in the previous judgment. The Court indicated that, if the lower court had entertained a petition by which an amendment of matters of substance was sought, the period for seeking review by the Court *would* have been extended. 344 U.S. at 210-11. Similarly, in *Department of Banking* v. *Pink*, 317 U.S. 264, 266 (1942), the Court clearly distinguished a request for certification of a federal question, which did not toll the running of the period

[3] In the court below, the Government argued the law of the case as an alternative to its argument for dismissal of the appeal, assuming for purposes of the alternative argument "that this appeal could be maintained." Br. for United States, 5th Cir. No. 85-2536, p. 6.)

for filing certiorari, from requests to alter the rights adjudicated by a prior order, which, if entertained, *would* suspend the running of the period for review.

Thus the cases cited by the Government actually confirm that petitioners' petition for certiorari, filed within 90 days of the court of appeals' third and final decision, was timely.

2. On the merits, the Government mistakenly states that, for all the usual reasons, the case does not present any issue warranting review by this Court. (Br. in Opp. 5.) To the contrary, the issue posed by the court of appeals' refusal to permit consideration of the element of value represented by the pipeline corridor crossing petitioners' lands is an important issue in eminent domain law. The resolution of the issue by the court below is inconsistent with decisions of this Court and conflicts with decisions of other courts of appeals.

a. The Government blandly states that the "government's valuation witness followed" the "before-and-after" method of valuation. (Br. in Opp. 2.) He did not. That he did not is clear from a simple comparison of the court of appeals' description of the before-and-after method, quoted by the Government (Br. in Opp. 3), and the description in the brief in opposition of the Government valuation witness' testimony. The point is important because the judgment dictated by the court of appeals rested solely on that witness' evidence.

The court of appeals said that, when an easement is taken, "the proper measure of damages is . . . the before-and-after method of valuation, expressed as the difference between the market value of the land free of the easement and the market value as burdened with the easement." (Pet. 52a-53a.) The Government's valuation witness made no effort to estimate any such before-and-after difference in value of petitioners' tracts free of and burdened by the pipeline easement. As the Government says,

its appraiser valued the landowners' loss for which they were to be compensated at 90 percent of the value of the very strip of land over which the easement was taken, "considered as industrial property." (Br. in Opp. 9.) That description of the testimony has the virtue of candor for it ignores the mathematical doodling in which the witness engaged to make it appear that he had made a true before-and-after valuation (Pet. 14). But it lays bare the fact that the court of appeals, nominally insisting on a before-and-after valuation of the parent tracts, in fact imposed a method of valuation that had regard narrowly to the small strip of land beneath which the new pipeline or pipelines would be laid and grossly undervalued the taking by turning a blind eye to the element of value imparted to the tracts as a whole by the existing pipeline corridor.

b. It may be because of its apparent misunderstanding of before-and-after valuation that the Government asserts that the district court's effort, after the first remand, to find a genuine before-and-after valuation in the Government's evidence on which it had been directed to rely constituted the acceptance of a "severance damage theory." (Br. in Opp. 4.) As the Government says, the district court found that "the tracts in their entirety were damaged by the taking in the amount of $465 per acre." (*Id.*) That finding was a pure before-and-after finding, based on two sales in the Government witness' study, one of a tract free of an easement and the other of a tract burdened with an easement. (Pet. 71a-72a.) The difference in sales value was $465 an acre.

The court found support for this difference in value indicated by the sales of comparable tracts in the particular circumstances of the tracts in issue. It found that the Government's pipeline easement, which carried the right to lay an unlimited number of pipelines, "is such a burden on the land as to sharply reduce the value of the parent tracts." (*Id.* at 73a.) That is exactly the

kind of reduction in value that the before-and-after method is supposed to measure. It reflects no "new theory" of severance damages (Br. in Opp. 8).

c. The error of the court of appeals lay not just in its mistaken belief that the method of valuation it prescribed was the approved before-and-after method but also, and principally, in its mechanical insistence that, because the highest and best use of the tracts considered as a whole was industrial, the element of value imparted to them by the additional compatible use indicated by the existence of the pipeline corridor could not be considered.

The substantiality of the value of the compatible use is demonstrated by the landowners' evidence of sales of pipeline easements in the vicinity—19 of them. Contrary to what the Government asserts (Br. in Opp. 9 n.2), these sales do indicate the value of what the landowners lost when the Government took the multi-pipeline, assignable easement over their tracts. If some of the sales were to companies that lacked the power of eminent domain, which might suggest a bargaining advantage for the seller, others, on which the landowners were happy to rely, were to companies that did have the condemnation power and therefore had a bargaining edge over the seller and no reason at all to pay the "hold-up" prices to which the Government refers.

Whether as a result of a genuine application of the before-and-after method or by simple, straightforward reference to the 19 comparable sales of pipeline rights-of-way in the vicinity, petitioners had to be compensated for the element of value represented by the attractiveness of their land to pipeline builders and the pre-emption by the Government of some of their opportunities to sell pipeline rights-of-way. The court of appeals' failure to recognize that element of value denied the petitioners the just compensation to which they are entitled under the Fifth Amendment.

CONCLUSION

For the reasons stated above and in the petition, certiorari should be granted.

Respectfully submitted,

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